



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Energy and Environmental Research Corporation

File: B-261422; B-261422.2

Date: August 23, 1995

Sarah M. McWilliams, Esq., Charles A. Patrizia, Esq., and William J. Simpson, Esq., Paul, Hastings, Janofsky & Walker, for the protester.

Mark A. Brinton, Esq., Jones, Waldo, Holbrook & McDonough, for Reaction Engineering International, an interested party.

Gena E. Cadieux, Esq., Curtis W. McBride, Esq., Thomas J. Russial, Esq., Department of Energy, for the agency.

Paul E. Jordan, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where broad language describing technologies which could be researched in Program Research and Development Announcement (PRDA) solicitation topic did not require offerors to propose research encompassing all listed technologies, agency determination that proposal to research fewer than all of the listed technologies was technically acceptable is unobjectionable.
2. Agency is not required to conduct discussions with offeror submitting proposal evaluated as technically superior where solicitation advises offerors that award may be made on the basis of initial proposals and that offerors should submit proposals representing their best terms.
3. Selection for award of offeror with lower-rated, lower-cost proposal is unobjectionable where record establishes that agency reasonably determined protester's technical advantage was not worth the associated cost which was 2.8 times higher than awardee's cost.

DECISION

Energy and Environmental Research Corporation (EER) protests the selection of Research Engineering International (REI) for award of a contract under Program Research and Development Announcement (PRDA) No. DE-RA22-94PC-92291, issued

by the Department of Energy (DOE) for study and development of advanced technologies to reduce emissions generated by coal-fired power plants. EER contends that the agency's selection of REI violated the provisions of the PRDA.

We deny the protest.

The PRDA sought innovative technical approaches to solve a broad array of environmental problems associated with pulverized-coal-fired power generating stations. It contemplated multiple awards of contracts to perform research under as many as nine designated topic areas. Offerors were required to submit a separate proposal for each topic on which they proposed. Contract performance was to be accomplished in two phases, with Phase II performance to be based upon programmatic relevance and technical progress made in the 2-year Phase I period. Contract payments were to be made on a cost-sharing basis with contractors paying a minimum of 20 percent of costs and the government paying the balance. The PRDA stated that the total estimated funding for support of all awards (both Phases) was \$27.8 million. DOE reserved the right to accept or reject any or all proposals or any portion of a proposal, to request additional clarifying information and/or to conduct discussions. However, the PRDA advised offerors that DOE intended to make award selections on the basis of initial proposals, and offerors were warned to submit their most favorable terms in their initial proposals.

Proposals were to be evaluated in five areas: technical (85 percent); business/management and funding (10 percent); environmental, health, safety, and societal (EHSS) impact evaluation (5 percent); and cost (not scored). The non-cost criteria were considered more important than cost. In addition, the agency indicated that it would apply two program policy factors. Consideration was to be given first to proposals representing a diversity of philosophies and technical approaches and, second, to that set of proposals that would best accomplish DOE's programmatic objectives, taking into account current and planned relevant work sponsored by DOE and other institutions.

The source selection official (SSO) was to select a mix of proposals for award taking into account the relative non-cost criteria rankings, as well as the listed program policy factors in determining which proposals best satisfied the program objectives. In determining overall value to the government, apparent advantages were to be weighed against each proposal's evaluated cost. A superior technical proposal would have an advantage over less qualified technical proposals with lower evaluated costs, but only so long as the superior proposal was considered worth the cost differential.

The agency received 108 proposals, including those of EER and REI, by the September 23, 1994, closing date. Eight proposals were rejected during the preliminary evaluation while the others were reviewed in a 5-month comprehensive

evaluation. EER and REI both submitted proposals under Topic 1, entitled "NO_x Formation/Destruction and Carbon Utilization in Low-NO_x Combustion Systems."¹ EER's proposal, evaluated at 732 out of 1,000 points, was broader in scope than REI's proposal, which was evaluated at 614 points. The agency's cost evaluation concluded that both offerors' proposed costs represented the most probable costs of performance. The government's share of EER's two-phase cost would be \$5.9 million, and its share of REI's two-phase cost would be \$2.1 million.

The SSO selected 17 proposals for award under eight of the topic areas, which he determined met both policy objectives of balanced program and diverse philosophies/technical approaches.² In general, the SSO selected the highest-ranking proposals overall for award. Higher-ranking proposals were not selected in some cases because the work proposed was similar to work covered in other proposals, or where the lower-ranked proposals "added to the mix" of desired proposals, or were otherwise more advantageous than higher-ranked proposals. The SSO recognized that EER's Topic 1 proposal was technically outstanding and higher ranked than REI's proposal. However, in view of budget constraints and the agency's intention to fund the best mix of projects, the SSO determined that EER's proposal, being 2.8 times higher in cost than REI's, was not worth the additional cost to the government.

On February 21, 1995, DOE advised EER that its Topic 1 proposal had not been selected and, on March 21, provided EER with a debriefing. EER filed a protest with the agency and upon its denial, filed this protest with our Office. Pending the outcome of this protest, DOE has not awarded any of the 17 contracts.

EER first contends that the selection of REI's Topic 1 proposal was improper because REI's proposal was technically unacceptable.³ Where an evaluation is challenged, we will examine the evaluation to ensure that it was reasonable and consistent with the evaluation criteria and applicable statutes and regulations, since the relative merit of competing proposals is primarily a matter of administrative discretion. Information Sys. & Networks Corp., 69 Comp. Gen. 284 (1990), 90-1 CPD ¶ 203. Mere disagreement with the agency's evaluation does not itself render the

¹EER submitted proposals for a number of topics and was selected for award under Topic 2. REI submitted one other proposal which was not selected for award.

²No proposals were selected for Topic 8, CO₂ Emission Abatement, because no proposals for this topic had any significant technical merit or value to the overall program.

³EER also raised a number of ancillary issues concerning the evaluation of proposals under the PRDA. We have reviewed them all and find that none have merit. This decision addresses the primary issues raised by EER.

evaluation unreasonable. Litton Sys., Inc., B-237596.3, Aug. 8, 1990, 90-2 CPD ¶ 115.

The objective of research for Topic 1 was "to improve the performance of 'in-furnace' NO_x control processes by carrying out basic and applied research [addressing] the technical issues believed to be responsible for less than desirable performance." The Topic description explained that "in-furnace" methods included use of "low-NO_x burners, staged combustion, reburning, selective non-catalytic reduction, and combinations of these approaches." The goal of the Topic 1 research was "to devise new or improve existing approaches for 'in-furnace' NO_x control for large coal-fired furnaces." The approaches were expected to "simultaneously achieve lower levels of NO_x and higher carbon conversion (low levels of carbon in ash) than is currently possible." Proposals were sought "to address the issues of in-furnace NO_x reduction and carbon utilization in a comprehensive, fundamental manner." Teaming arrangements were "encouraged to ensure that the broad range of technical issues involved [were] completely addressed."

EER argues that the references to "comprehensive" and "fundamental" treatment of issues, specific identification of four in-furnace control methods, "approaches," and "broad range" of issues, specify that, at a minimum, any proposal must be broad, comprehensive, and address all in-furnace control methods. Since REI's proposal did not address all technologies, EER contends that it failed to meet the minimum requirements for a Topic 1 proposal. In our view, EER's reading of the Topic 1 description is overly restrictive.

A PRDA is a special contracting method authorized under DOE Acquisition Regulations Subpart 917.73. PRDAs solicit research and development ideas where the requirement cannot be sufficiently defined for standard advertised or negotiated acquisition procedures and where diverse technical approaches are available to meet program objectives. PRDAs provide offerors the freedom to develop innovative approaches for technology advancement in defined program areas of interest. Accordingly, the various topic descriptions, including that for Topic 1, do not include specifications and minimum requirements in the same fashion as in a more conventional negotiated procurement. Instead, they provide goals and objectives; offerors are left to propose a statement of work and "specifications" which will meet those goals.

The stated objective in Topic 1 is to improve in-furnace NO_x control processes with the goal of devising new, or improving existing, approaches of that control. While the topic description mentions four methods of in-furnace control, it is plain from the context that DOE simply wanted to identify what it considered to be in-furnace NO_x control methods. Nothing in the description requires that offerors address all of the four methods in their proposed research. References to comprehensive and fundamental treatment refer to how offerors were to address the issues included in their proposals; these references cannot fairly be construed to require that

proposals include a treatment of all listed methods.

This interpretation is supported by DOE's answer to a question at the pre-proposal conference. One offeror asked, "[f]or responses pertaining to an individual topic, does DOE have a preference for proposals based on one single technology versus a multiple technology assessment, perhaps which screens and recommends the best options for potential Phase 2 funding?" DOE responded that it had "no preference." This response makes plain that neither an all-encompassing, nor a narrower approach was preferred, much less required. Further, only the protester interpreted the description as mandating an all-encompassing approach; eight other offerors on Topic 1 interpreted the solicitation to permit proposals to perform research on less than all in-furnace NO_x control methods. Reasonably construed, the Topic 1 description allows both approaches to meeting the objectives and goals of the research.

Here, REI proposed to focus on two of the four listed methods of in-furnace NO_x control and planned to investigate five areas of interest to DOE including furnace design and various chemical reactions. The agency reasonably concluded that REI's focus on less than all identified examples of methods represented a technically acceptable proposal. EER was not penalized for its interpretation of Topic 1; on the contrary, its broader proposal was rated higher than REI's more narrow proposal.

In a related argument, EER contends that REI's proposal also is technically unacceptable because its commercial potential was limited to a single manufacturer with which it had teamed in its proposal. This allegation is without merit. Nothing in the topic description required that different manufacturers or their products be used in order for a proposal to be found acceptable. Further, while REI will use a single manufacturer's products, DOE expected the results of the research to be valuable in the design of other burner manufacturer systems and the evaluators recognized that "industry would benefit" from the information collected in REI's research. Further, commercial potential was only one of four considerations identified by the PRDA as matters for the evaluators to include in their "comprehensive evaluation" of the merits of each proposal. The remaining considerations included potential success of the project, the business/management performance potential of the proposer, and the reasonableness of the project cost. All of these considerations were to be applied as the agency evaluated the proposals against the stated evaluation factors of technical, business/management, EHSS, and cost. Thus, even if REI's proposed commercial potential is more limited than that offered by EER's proposal, this would not render REI's proposal unacceptable. EER's arguments to the contrary reflect its disagreement with DOE's evaluation and do not render the evaluation unreasonable. Id.

EER next contends that DOE should have conducted discussions with it before

selecting REI. We disagree. A contracting agency may make an award on the basis of initial proposals, and not conduct discussions or allow offerors to revise their proposals, where the solicitation advises offerors of that possibility and the competition or prior cost experience clearly demonstrates that acceptance of the initial proposal will result in the lowest overall cost to the government. Federal Acquisition Regulation (FAR) § 15.610(a)(3); Professional Safety Consultants Co., Inc., B-247331, Apr. 29, 1992, 92-1 CPD ¶ 404; American President Lines, Ltd., B-236834.8; B-236834.9, May 15, 1991, 91-1 CPD ¶ 470.

Here, the RFP specifically advised offerors to submit, in their initial proposals, the most favorable technical and cost terms since award could be made on the basis of initial proposals without conducting discussions. The record shows that after evaluating initial proposals, the agency did not conduct discussions with any offeror. The record also shows that adequate competition existed and that an award to REI would result in the lowest overall cost to the government under Topic 1. Further, EER's proposal was rated higher than that of REI and the agency identified no uncorrectable weaknesses in its proposal.

EER next contends that DOE's selection decision is flawed because DOE ignored the technical superiority of the EER proposal and selected REI solely on the basis of its lower cost. In EER's view, the agency also failed to properly document any cost/technical tradeoff. In a negotiated procurement, agency selection officials have broad discretion in determining the manner and extent to which they will make use of the technical and cost evaluation results. Cost/technical tradeoffs may be made; the extent to which one may be sacrificed for the other is governed by the test of rationality and consistency with the established evaluation factors. General Servs. Eng'g, Inc., B-245458, Jan. 9, 1992, 92-1 CPD ¶ 44. An agency may select an offeror with a lower-cost, lower-scored proposal if it determines that the cost premium involved in awarding to a higher-rated, higher-cost offeror is not justified. Dayton T. Brown, Inc., B-229664, Mar. 30, 1988, 88-1 CPD ¶ 321.

While the selection official's judgment must be documented in sufficient detail to show it is not arbitrary, KMS Fusion, Inc., B-242529, May 8, 1991, 91-1 CPD ¶ 447, an SSO's failure to specifically discuss the cost/technical tradeoff in the selection decision document does not affect the validity of the decision if the record shows that the agency reasonably determined that a higher technically scored proposal is not worth the additional cost associated with that proposal. McShade Gov't Contracting Servs., B-232977, Feb. 6, 1989, 89-1 CPD ¶ 118.

Here, the solicitation provided that award would be made to a mix of proposals based upon evaluation findings, relative rankings for non-cost factors, and policy factors in determining which proposals would best satisfy the program objectives. In determining overall value to the government of individual offers, the SSO was to

weigh apparent advantages of proposals against the evaluated probable cost. The SSO did not ignore the technical superiority of EER's proposal, rather he determined that the superiority was not worth the associated additional cost.

In making his selection, the SSO stated that he had chosen the 17 proposals which represented an opportunity to satisfy both program policy factors: the desire to establish a balanced program that supports power systems development, and to represent a diversity of philosophies and technical approaches. The totality of proposals selected represented an integrated, balanced program among pre-combustion, combustion and post-combustion technologies and pollutant categories to be controlled. While the SSO recognized the technical superiority of EER's proposal, he also considered budget constraints and the need to fund the best mix of projects. In this context, he concluded that EER's "outstanding" proposal was not worth a cost 2.8 times higher than REI's.

The SSO's selection document does not detail the specific rationale for his selection of REI's proposal over that submitted by EER. The agency explains that it is difficult to provide a "head-to-head" comparison of competing proposals for the same topic. Apart from identifying the topic area and areas of inquiry in which the agency is interested, the PRDA did not specify which issues must be covered and each proposal represents a unique approach to addressing a variety of technical issues. Under these circumstances, we believe the findings of the evaluation team adequately support the SSO's decision.

The majority of the difference in proposal scores for EER and REI lay in the technical factor; the offerors' scores in business/management and EHSS were virtually the same. Under the technical factor, the evaluators found numerous strengths in REI's proposal and identified no deficiencies or uncorrectable weaknesses. They found REI's proposal had carefully constructed the technical rationale for the project by reviewing past relevant work and technical issues. The proposal also successfully established the relevance and consistency of the proposed effort to the PRDA objectives. REI's principal investigator had extensive experience in coal-related research and REI had been awarded a significant number of past contracts relevant to the proposed effort. REI's selection of its commercial teammate also was seen as a strength since the teammate would provide important commercialization expertise. The proposal provided data which indicated a need for the information to be collected in the project and the evaluators concluded that the research results could significantly benefit industry. Plainly, the REI proposal represented an acceptable and strong treatment which met the Topic 1 parameters and the agency's expectations at a reasonable cost. According to the evaluators, EER's proposal, while broader in scope and containing its own identified strengths, simply was not worth a substantial additional cost. In this regard, the agency further explains that selection of EER's proposal would mean the elimination of other proposals in other topic areas.

EER does not dispute this, but argues that since its proposal is superior to REI's and other proposals, had the agency selected it, DOE would still have had an appropriate mix.⁴ EER explains that the selected mix is too heavy on air toxic issues (Topics 5, 6, and 7). The protester does not elaborate on which other proposals might be eliminated or how its broad proposal in Topic 1 would satisfy the agency's requirements under other topics. Its mere disagreement with the agency's mix determination does not render that determination unreasonable. Litton Sys., Inc., supra.

EER also contends that making the determination on the basis of available funding is improper because funding was not specified as an evaluation factor. Solicitations are required to clearly state all evaluation factors to be considered in source selection and their relative importance. FAR § 15.605(e). However, funding limitations are not evaluation factors within the meaning of FAR § 15.605(e). See Computer One, Inc.-Recon., B-249352.7, Sept. 27, 1993, 93-2 CPD ¶ 185. While agencies are required to disclose price-related and other evaluation factors, as a general rule, they are not required to disclose budget information, such as funding limitations, in solicitations. Id.; Charles Trimble Co., B-250570, Jan. 28, 1993, 93-1 CPD ¶ 77.

In any case, the PRDA advised offerors of the anticipated \$27.8 million funding limit for both phases of this procurement and the agency's anticipation that it would make 20 to 25 awards. The evaluation factors did advise offerors that apparent advantages would be weighed against probable cost. Further, during the pre-proposal conference there were a number of questions concerning the funding limitation. In response, the agency explained that there was no maximum amount for a Phase I project, but that DOE was "constrained by available funds and the number of projects it wishes to fund." It also refused to speculate on the "probability" of any percentage of single proposers receiving an award of more than \$5 million. Thus, the agency made clear that it would consider its funding limit in determining the mix of proposals it would select. In view of the nine potential topics to receive awards, and the anticipation that 20 to 25 awards would be made,

⁴In an alternative argument, EER contends that, as specifically permitted in the PRDA, DOE should have simply accepted portions of its proposal which would not exceed the funds available for the agency's selected mix. The agency acknowledges that it could have selected portions of EER's proposal but maintains that a "carved out" proposal would not necessarily have received as favorable a ranking as EER's complete proposal. EER did not submit alternative proposals detailing discrete costs associated with reduced scope. It only proposed an alternate funding profile which would not have reduced overall cost, but could have delayed some Phase I costs to later years. Under these circumstances, we find unobjectionable the agency's decision to consider only EER's complete proposal.

EER should have recognized that a \$5 million award to a single proposal would be exceptional. Under the circumstances, the agency's consideration of its funding limitation in determining a proper mix of awards was reasonable and appropriate.

The protest is denied.

\s\ Christine S. Melody
for Robert P. Murphy
General Counsel